

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

LAZARO & MIREYA SARDINAS,

2:10-CV-501 JCM (RJJ)

Plaintiff,

V.

SECRETARY OF THE TREASURY  
TIMOTHY GEITHNER, et al.,

## Defendants.

## ORDER

Presently before the court is defendant Michelle Lapadu’s (“Lapadu”) motion for judgment on the pleadings. (Doc. # 32). To date, plaintiffs Lazaro and Mireyas Sadinas (“plaintiffs”) have failed to respond.

18 Plaintiffs obtained a mortgage refinance loan through co-defendant Direct Access Lending  
19 (“DAL”) in December of 2007. As part of its underwriting process, DAL submitted an appraisal  
20 request to Lapadu to conduct a professional appraisal of the subject property. Accordingly, Lapadu  
21 submitted a Uniform Residential Appraisal Report (“appraisal report”) to DAL. Thereafter, DAL  
22 made a refinance loan to plaintiffs, who then defaulted on their loan less than one year later.

23 Plaintiffs allege that Lapadu falsified her appraisal report by inflating the value of the  
24 property and claim they would have declined the refinancing had they reviewed the subject appraisal.  
25 Accordingly, plaintiffs assert claims against Lapadu for (1) deceptive trade practices; (2) fraud in the  
26 inducement; and (3) negligent misrepresentation. Lapadu now moves for judgment on the pleadings  
27 under Federal Rule of Civil Procedure 12(c).

1       Under Federal Rule of Civil Procedure 12(c), “after the pleadings are closed—but early  
 2 enough not to delay trial—a party may move for judgment on the pleadings.” The standard is  
 3 equivalent to that of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief  
 4 can be granted. *See Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

5       To survive such a motion, a complaint must be pled in such a fashion as to show the  
 6 plaintiff’s entitlement to relief. This “requires more than labels and conclusions, and formulaic  
 7 recitation of [a cause of action’s elements] will not do.” *Bell Atl. Corp. v. Twombly*, 550 US. 544,  
 8 555 (2007). Additionally, the plaintiff must detail the circumstances surrounding the alleged fraud  
 9 with particularity as required under Federal Rule of Civil Procedure 9(b), including allegations  
 10 establishing the time, place, identify of the parties involved, and the nature of the fraud. *Yourish v.*  
 11 *Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999).

12       Local Rule 7-2(b) provides that unless otherwise ordered, responses to motions “shall be filed  
 13 and served by an opposing party fifteen (15) days after service of the motion.” Local Rule 7-2(d)  
 14 provides that failure to file a response “shall constitute a consent to the granting of the motion.”  
 15 Plaintiffs have not filed a timely response to this motion. However, the court cannot dismiss an  
 16 action simply because a party violated a local rule. *See Martinez v. Stanford*, 323 F.3d 1178, 1182  
 17 (9th Cir. 2003). To succeed on this motion unopposed, the moving defendant must still affirmatively  
 18 show that plaintiffs failed to state a claim upon which relief can be granted. *Id.*

19       This court finds plaintiffs have failed to assert facts sufficient to give rise to any cognizable  
 20 fraud or deceptive trade practices claims against Lapadu. First, plaintiffs’ fraud-based claims are  
 21 unsustainable. Plaintiffs allege that Lapadu violated NRS 598.0915(15), which provides that “[a]  
 22 person engages in a ‘deceptive trade practice’ if, in the course of his or her business or occupation,  
 23 he or she [...] knowingly makes any other false representation in a transaction.” To plead  
 24 successfully a claim for relief for fraud, a plaintiff must allege the following six elements:

25  
 26       (1) Defendant represented to plaintiff an important fact was true;  
 27       (2) defendant’s representations were false; (3) defendant knew that  
 28       the representation was false when it was made; (4) at the time the  
 representation was made, defendant intended to rely on the

1 misrepresentation; (5) plaintiff justifiably relied on defendant's  
 2 misrepresentation in taking action or refraining from acting; (6)  
 3 plaintiff was harmed; and such harm resulted from plaintiff's  
 4 reliance on the intentional misrepresentation of defendant.

5 *Lubbe v. Barba*, 91 Nev. 596, 600 (1975).

6 Here, plaintiffs allege Lapadu made false statements to DAL, but fail to demonstrate any false  
 7 representations running from Lapadu to plaintiffs. The alleged misrepresentations cited in the  
 8 complaint were made to DAL in the context of Lapadu's appraisal report, which plaintiffs did not  
 9 review until after closing. Further, the appraisal transaction was between Lapadu and DAL, not  
 10 plaintiffs. DAL requested the appraisal, and the appraisal identified DAL as the intended user and  
 11 client.

12 Further, the complaint fails to establish justifiable reliance with any degree of specificity.  
 13 Plaintiffs do not state the time, place, or manner of their alleged reliance on Lapadu's  
 14 representations, but aver that they would have relied on the appraisal report had they received it.  
 15 There is no accompanying allegation that plaintiffs requested a copy of the appraisal report.

16 Additionally, defendant's alleged misrepresentations concerning the value of the subject  
 17 property are not actionable because they were statements of opinion, not fact. An appraisal is "an  
 18 analysis, opinion, or conclusion [...] relating to the nature, quality, value, or use of a specified interest  
 19 in, or aspect of, identified real estate for or with the expectation of receiving compensation." NRS  
 20 645C.030. "An estimate of value is an opinion as to value upon which reasonable and honorable  
 21 men may hold differing views." *Clark Sanitation Inc. v. Sun Valley Disposal Co.*, 87 Nev. 338, 341  
 22 (1997). Expressions of opinion are not representations of fact, and cannot be the basis for a fraud  
 23 claim. *Id.* at 341-42. Here, defendant's estimate of the property value was an opinion, and plaintiffs  
 24 cannot establish that Lapadu misrepresented a material fact.

25 Plaintiffs' fraud in the inducement claim is also unsustainable. A claim for fraud in the  
 26 inducement requires a party to prove (1) a false representation; (2) knowledge or belief that the  
 27 representation was false; (3) intent to induce the plaintiff to consent to the contract's formation; (4)  
 28 justifiable reliance upon the misrepresentation; and (5) damages resulting from such reliance. *J.A.*

*Jones Const. Co. v Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290 (2004).

Here, plaintiffs have not established that Lapadu made false representations to plaintiffs or that defendants intended to induce plaintiffs to consent. Plaintiffs were contractually bound to enter into the loan agreement before they became aware of the appraisal. Had Lapadu intended to induce plaintiffs to rely upon the appraisal report, she could have provided plaintiffs with the appraisal.

Finally, plaintiffs' claim for negligent misrepresentation is deficient. To succeed on a negligent misrepresentation claim, plaintiffs must show (1) a false representation, (2) in the course of the defendant's business, (3) for the guidance of others in their business transactions, (4) that plaintiff justifiably relies on, (5) resulting in pecuniary loss, (6) and that the defendant failed to exercise reasonable care in obtaining or communicating the information. *See Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447 (1998).

Plaintiffs have failed to set forth with particularity facts supportive of the elements of a negligent misrepresentation claim. Other than plaintiffs' contention that Lapadu made certain representations to a third party, plaintiffs have not stated the time, place, or manner of any alleged misrepresentations defendants made to plaintiffs. Accordingly, plaintiffs' contention that Lapadu was aware that plaintiffs would rely on her appraisal report in making an informed decision is conclusory and without support.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Michelle Lapadu's motion for judgment on the pleadings (Doc. #32) be GRANTED.

20 DATED July 30, 2010.

James C. Mahan  
**UNITED STATES DISTRICT JUDGE**